SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARTIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED. HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR., *Petitioners*

v.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT.

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PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Kansas Supreme Court entered in the above-entitled case on April 6, 1963.

CITATION TO OPINION BELOW

The Opinion of the Kansas Supreme Court appears at 191 Kan. 293 (advance sheets) and is reproduced herein as Appendix D.

JURISDICTION

The judgment of the Kansas Supreme Court was entered on April 6, 1963. Rehearing was denied on May 17, 1963. Mr. Justice Goldberg entered orders on August 15, 1963 and September 10, 1963 granting petitioners' motions for extension of time within which to file a petition for certiorari to September 15, 1963 and to October 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where it is possible that an operator of pinball machines who has paid the $250 Federal stamp tax imposed by 26 U.S.C. § 4461(a)(2) has nevertheless *not* violated the Kansas anti-gambling law, does a Kansas municipal ordinance, aimed at suppression of gambling, violate due process requirements by depriving the operator of a license to operate pinball machines solely because of his payment of the Federal tax, without according him a procedural opportunity to prove that he has not in fact violated the Kansas anti-gambling law?

2. Does a Kansas municipal ordinance violate the due process or equal protection clause of the Fourteenth Amendment by providing that, solely because they have paid the $250 Federal stamp tax, pinball machine operators lose their rights to operate pinball machines, although (a) neither the machines nor their use violate applicable Kansas anti-gambling laws and

(b) the ordinance does not deny a license to operators who, though obligated to pay the Federal tax, have not done so?

3. Does a municipal ordinance violate the due process clause of the Fourteenth Amendment by declaring that whether an applicant may receive a license to operate pinball machines depends upon whether the City Police Chief determines that the applicant possesses "good moral character," if neither the ordinance nor any other legislation sets any criteria or standards of "good moral character?"

STATUTE INVOLVED

The statute involved in this case is an ordinance promulgated by the City of Kansas City, Kansas on November 16, 1961, known as Ordinance No. 43040. It is reproduced herein as Appendix C.

STATEMENT

A. The Legal Background

Kansas State law forbids "gambling". A criminal statute outlaws the keeping in public or private places of any "slot machine or gambling device, devised and designed for the purpose of playing any game of chance for money or property. . . ." G. S. 1949, 21-1508 (App. A)

However, in the leading case of *State* v. *Waite*, 156 Kan. 143, 131 P. 2d 708, the Kansas Supreme Court held that the ordinary "pin-ball" machine which pays off high scores with free games is not such a "slot machine" or "gambling device" as is outlawed by G. S. 1949, 21-1508. The Court reaffirmed this view in *State* v. *One Bally Coney Island No. 2101f Gaming*

Table, 174 Kan. 757, 258 P. 2d 225, holding another "pin-ball" machine not subject to seizure and destruction under the act.

Federal law requires payment of a $250 stamp tax on ". . . so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens." Int. Rev. Code, 26 U.S.C. § 4461(a)(2) and § 4462(a)(2)

A regulation promulgated by the Treasury Department pursuant to 26 U.S.C. § 4462(a)(2) provides that pinball machines may be taxable under 26 U.S.C. §§ 4461(a)(2) and 4462(a)(2) even though no payoffs are made in connection with their operation nor any reward other than the ordinary free games is received. Treas. Reg. 45.4462-1(b) (App. B) The validity of the Treasury regulation's extension to pinball machines of the $250 stamp tax imposed by 26 U.S.C. § 4461(a)(2) upon "slot machines," does not appear to present any legal question. See *United States* v. *Korpan*, 354 U.S. 271 (1957).

Against this legal background, the city of Kansas City in 1961 enacted an ordinance, No. 43040, imposing a license requirement for the privilege of operating any coin-operated amusement device, including pinball machines. Such a license, the ordinance declared, must be refused to any applicant who has paid the $250 stamp tax required by Federal law under 26 U.S.C. § 4461(a)(2) (and withdrawn from any such person to whom it was issued before discovery of his payment of the Federal tax). After ordaining that any person, firm or corporation keep-

ing for operation any coin-operated amusement device, including pinball machines, must secure a City license, the ordinance specifies in Section 2 that all applications for licenses must be made on a standard form including certain enumerated information. In relevant part it states:

> "(d) Whether applicant or owner has paid a current $250.00 federal occupational tax for the use or permit to use on any place or premises in Kansas City, Kansas, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26) Paragraph (2), of Section 4461(a) of the United States Code Annotated. No license shall be issued to any applicant, and the license if issued shall be revoked, whenever the applicant or owner has paid a $250.00 current federal occupational tax for the use or permit to use on the place or premises where the machine or device is to be displayed, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26), Paragraph (2) of Section 4461(a) of the United States Code Annotated."

B. The Present Case

Twenty-five operators of small Kansas City businesses filed a complaint in the District Court of Wyandotte County, seeking a judgment declaring the ordinance unconstitutional and an injunction against its enforcement. In their complaint the plaintiffs alleged that they all operated small businesses within Kansas City, that most contained coin-operated pinball machines on the premises for the purpose of producing supplemental income and that the machines were used solely for amusement purposes. They further alleged that most of their number had purchased $250 Federal Tax stamps when informed by Federal agents that all

such coin-operated devices were subject to the tax, regardless of whether there was gambling on the devices. The basis of these alleged statements by the agents was Treasury regulation 45.4462-1(b) (App. B)

In their pleadings the plaintiffs advanced two distinct theories of unconstitutionality. One was that Section 2(d) of the ordinance, which would effectively deprive them of the right to operate pinball machines for amusement purposes and incidental income to themselves, constituted a deprivation of their constitutional rights under the Fourteenth Amendment. A second was that Section 3(c) of the ordinance, requiring approval by the Chief of Police and Electrical Inspector as a prerequisite for a license, was an illegal delegation of legislative power.

After answering pleadings, the matter was submitted to the Court without the introduction of any evidence. After hearing arguments, the Court declared the ordinance unconstitutional, affirming both of plaintiffs' arguments above and enjoining the implementation of the ordinance. (R. 25).

On appeal by City officials, the Kansas Supreme Court reversed the county court decision. While conceding the principles enunciated in *Waite* and *Coney Island* cases, and without contesting that the plaintiffs below had operated the pinball machines in question solely for amusement purposes, the Court nevertheless concluded that the ordinance was not unreasonable or arbitrary, hence did not violate standards of due process. The Court bottomed its rationale not upon the view that the pinball machines were gambling devices within the purview of state law, but upon the premise that payment of a $250 Federal stamp ". . . raises a strong presumption of illegal activity." (App.

D. 18a) Such a presumption, reasoned the Court, in and of itself justifies the prohibitions of the ordinance, so far as due process is concerned. The Court rejected the argument based on delegation of legislative authority by construing the ordinance to limit the functions of the inspecting officers "to the duties specifically stated," and holding that "if the applicant and his premises meet the standards required by the ordinance, these officers are obligated to approve the application." (App. D. 20a)

It is this decision that petitioners seek to have reviewed by their petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. This case presents the unusual situation of a Municipality seeking to employ a Federal statute and regulation for the purpose of achieving indirectly a certain social objective which the Municipality either cannot or has not elected to achieve directly. The technique of indirection employed by Kansas City can be easily emulated by other cities. The case is one of first impression and its disposition here will probably be closely observed by City Governments throughout the United States. If the instant case is not considered on its merits by this Court the "indirect enforcement" technique which petitioners consider violative of the Fourteenth Amendment may well be broadcast across the country. The present case is unquestionably the appropriate vehicle for a definitive resolution of the serious Constitutional questions posed by this technique.

2. It is inherently difficult to square the Kansas City ordinance with the Fourteenth Amendment. So far as the instant litigation is concerned the precise difficulty centers not so much upon the social end sought

to be achieved but upon the means by which the ordinance accomplishes its objective. The Kansas Supreme Court was evidently aware of this difficulty but did not fairly answer it.

The Kansas Supreme Court justifies the Kansas City ordinance, from a due process standpoint, by interpreting it as an act designed to inhibit "gambling" activities illegal under Kansas law. Such a social objective, as the Kansas Supreme Court repeatedly observes, falls well within the purview of the general police power enjoyed by the states. Granted that such an overall objective comports with due process requirements, the Kansas Supreme Court has nevertheless failed to rationalize the peculiar operational defects of the ordinance. The Kansas Supreme Court concedes that payment of the $250 Federal Stamp Tax does not in itself denote an operation in violation of the Kansas anti-gambling law. It therefore does not deny that the Kansas City ordinance may have the effect (and petitioners contend that in the instant case *has* had the effect) of denying operator's licenses to individuals whose pinball machines and their operation are perfectly legal. While the objective in the abstract is indeed justifiable, the means chosen to achieve the objective cannot be justified by any reason and are violative of fundamental fairness.

The court justifies the means not on the ground that payment of the $250 Federal Stamp Tax implies that the operator in question is, or has been, in violation of State law, but rather on the somewhat nebulous ground that such payment raises a logical "presumption" of illegal activity. What the Court in effect says is that there is some rational connection between payment of the tax and a *suspicion* of gambling activity, illegal

under State law. In so saying, it appears that the Kansas Court has confused such a "rational" suspicion with the more familiar imperative of due process, namely, the requirement of some reasonable or rational connection between the end of legislation and the means employed by the legislation. It may be assumed *arguendo* that payment of the $250 Federal tax affords some common sense grounds for suspicion or question as to whether an operator maintains illegal "gambling" devices. Almost certainly, the mere fact of such payment could not constitute probable cause for arrest of such an operator by State law enforcement authorities. The strength of the suspicion is of a lesser order, perhaps such as might reasonably lead a law enforcement official to investigate the operator's activities. Though far from compelling, the suspicion generated by the fact of payment is not wholly irrational. On the other hand, there is no reasonable connection between the methods employed by the ordinance and the "object sought to be attained" by it, see *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934).

If the object is to inhibit gambling activities, the operational methods of the ordinance are unreasonable in that they not only permit but *require* both gambling and non-gambling activities to be destroyed. To paint with such a broad brush in itself raises substantial due process questions. But this ordinance goes further. Not only does it condemn the just and the unjust alike, but it actually deprives all operators of any procedural opportunity to disprove the "presumption" of illegal activities which, according to the Kansas Supreme Court, arises from the fact of their payment of the Federal tax. Even if the "presumption" is fairly

drawn, it is eminently unfair not to allow an operator some reasonable opportunity to prove that he is not in violation of state anti-gambling laws. Instead, he is stripped of his property interest by legislative fiat. The notion of due process originally denoted procedural fair play, see *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856), and this is its most exalted significance today, E.g., *Morgan* v. *U. S.*, 304 U.S. 1, 18-19 (1938); *Twining* v. *New Jersey*, 211 U.S. 78, 110-111 (1908). In cutting off an operator's chance to exculpate himself, the ordinance obliterates the most basic tenet of procedural fair play, and perpetuates a system whereby both lawful and unlawful pinball operations are closed by the City. Such an approach to regulation of business operations cannot be squared with the dictates of due process.

3. Another Constitutional infirmity of the legislative method here questioned can best be stated in terms of the results of this very case. The petitioners all operate ordinary pinball machines. It is conceded that the machines themselves are not illegal under Kansas law. It is likewise agreed on the record of this case that they are in fact operated for amusement purposes only. In other words, both the machines as such, and the uses to which they are put by the petitioners, are perfectly lawful under general Kansas law. The ordinance does not purport to alter the legal character of the pinball machines or their use by the petitioners. It does, however, destroy the petitioners' right to continue their lawful operation of pinball machines because, having paid the $250 Federal stamp tax as demanded by Federal agents, these petitioners

no longer qualify for the license dictated by the ordinance.

It is not questioned, of course, that the $250 Federal tax is imposed by Treasury regulation 45.4462 1(b) upon pinball machines which are not "gambling" devices in the ordinary sense of the word and, as here, do not run afoul of state anti-gambling laws. The ordinance makes ineligible for a license any business proprietor who has paid such a Federal tax, regardless of whether the machines upon which it was paid, or their uses, violate state law. But the ordinance does *not* make ineligible the proprietor who is obligated under Federal law to pay the $250 tax and has failed to do so. The result of this technique of indirection is an uneven and unfair regulation of property rights. The proprietor who flouts Federal law is not disabled by this ordinance whereas the proprietor who obeys Federal law is driven out of the pinball machine business by it. This is invidious discrimination of an extreme character. Under either the equal protection or due process clauses, petitioners contend that this ordinance should not be allowed to stand. That its force falls unevenly upon the proprietors who obey Federal law and those who do not amounts to an unreasonable and unjust discrimination between the two classes, thus contravening the equal protection clause. See, *e.g.*, *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). This discrimination may itself be of such an injurious character as to bring into operation the due process clause. Cf. *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). In any event, that clause is manifestly pertinent because the relation between the

means and end of the ordinance is unreasonable, arbitrary and capricious.

4. There is an entirely separate due process question of considerable gravity which was not answered by the Kansas Supreme Court. The latter tribunal was apparently of the view that Section 3(c) of the ordinance created merely ministerial rather than discretionary powers in the Chief of Police. The Court explained that "reasonably construed, the ordinance limits the functions of these officers to the duties specifically stated, and if the applicant and his premises meet the standards required by the ordinance, these officers are obligated to approve the application." Perhaps because it was preoccupied with the issue as to delegation of legislative power, the Court overlooked entirely the more serious question of whether there are any standards or guidelines for the performance of the official duties.

The Chief of Police, according to Section 3(a) of the ordinance "shall investigate the location where it is proposed to operate such machine, ascertain if the applicant is a person of good moral character, and either approve or disapprove the application." The ordinance fails to specify *any* applicable standards for determining whether an applicant is a person of "good moral character." The phrase "good moral character," while not unknown among state and Federal statutes, is amorphous in content. Precisely because it lends itself to countless interpretations the phrase should be defined with precision. Passing the question of delegation of authority, petitioners contend that to permit the Chief of Police to decide whether an applicant may receive a license violates due process when his personal and private assessment

of "good moral character" is aided by no legislative standards or guidelines whatever. His discretion is thus allowed to run rampant, inviting numerous deleterious consequences. Among the harmful effects foreseeable is that his judgment will vary from applicant to applicant and that his freedom from any legal standards at all will tempt applicants into questionable or even illegal methods of prevailing upon him to grant their particular applications.

This question in its own right merits review and plenary consideration by this Court, since the official judgment of "good moral character" as contemplated by this ordinance is a device that may well be employed by many other unrelated ordinances in cities of this country. The constitutionality of the device should be decided before the device becomes more pervasive.

CONCLUSION

WHEREFORE, Petitioners pray that a Petition for Certiorari be granted.

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APPENDIX A

Kansas Anti-Gambling Statutes

G.S. 21-915. Every person who shall set up or keep any table or gambling device commonly called ABC, faro bank, EO, roulette, equality, keno, wheel of fortune, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property, or shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played at or by means of such table or gambling device, either on the side of or against the keeper thereof, or shall keep a place or room to be used as a place for playing any game of cards for money or property, or keep a common gaming house, or keep a house, room or place to which persons are accustomed to resort for the purpose of gambling, shall on conviction be adjudged guilty of a felony, and punished by imprisonment and hard labor for a term not less than one year nor more than five years.

G.S. 21-1508. Every person who shall set up or keep in any room where merchandise is sold or kept for sale, hotel office, clubroom, saloon, joint, gambling house, brothel or other public or private place any slot machine or gambling device, devised and designed for the purpose of playing any game of chance for money or property, and shall induce, entice or permit any person to bet or wager any money or other things of value thereon, shall on conviction thereof be adjudged guilty of a misdemeanor under this act, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a term of not less than thirty days nor more than one year.

APPENDIX B

Internal Revenue Code 26 U.S.C., § 4461

(a) . . . There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

(1) $10 a year, in the case of a device defined in paragraph (1) of section 4462(a);

(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); and

(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 531.

Internal Revenue Code 26 U.S.C., § 4462

(a) In general.—For purposes of this subchapter, the term "coin-operated amusement or gaming device" means—

* * * * * *

(2) any machine which is—

(A) a so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premiums, merchandise, or tokens, or

(B) A machine which is similar to machines described in subparagraph (A) and is oper-

ated without the inse tion of a coin, token, or similar object.

• • • • •

Treasury Regulation Promulgated Pursuant to the Foregoing Statute

T.R. 45.4462-1(b):

(2) Examples of machines or devices within scope of section 4462(a)(2). The following devices and machines illustrate the type of machines or devices within the scope of section 4462(a)(2).

(i) A machine which is operated by means of the insertion of a coin, token, or similar object and which, even though it does not dispense cash or tokens, has the features and characteristics of a gaming device whether or not evidence exists as to actual payoffs.

• • • •

(iii) A pinball machine equipped with a push button for releasing free play and a meter for recording the plays so released, or equipped with provisions for multiple coin insertion for increasing the odds.

(iv) Pinball machines in connection with which free plays are redeemed in cash, tokens, or merchandise, or prizes are offered to any person for the atttainment of designated scores.

• • • •

APPENDIX C

Ordinance No. 43040. An Ordinance regulating and imposing a license fee for the privilege of keeping or operating coin-operated amusement devices, providing for the revocation of such license, and providing penalties for violation thereof.

"Be it Ordained by the Governing Body of the City of Kansas City, Kansas:

Section 1. Any person, firm or corporation displaying for public patronage or keeping for operation any coin-operated amusement device shall be required to obtain a license from the City of Kansas City, Kansas, upon payment of a license fee. Amusement devices shall include but not be limited to pinball machines.

Section 2. Applications. Application for such license shall be made to the City License Department upon a form to be supplied by the License Department. The application for such license shall contain but not be limited to the following information:

(a) Name and address of the applicant, age, date and place of birth. Name and address of owner of machine.

(b) Place where machine or device is to be displayed or operated and the business conducted at that place.

(c) Description of machine to be covered by the license, mechanical features, name of manufacturer, serial number.

(d) Whether applicant or owner has paid a current $250.00 federal occupational tax for the use or permit to use on any place or premises in Kansas City, Kans[illegible] a coin-operated amusement or gam-

ing device under the Federal Internal Revenue Code (Title 26) Paragraph (2), of Section 4461 (a) of the United States Code Annotated. No license shall be issued to any applicant, and the license if issued shall be revoked, whenever the applicant or owner has paid a $250.00 current federal occupational tax for the use or permit to use on the place or premises where the machine or device is to be displayed, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26), Paragraph (2) of Section 4461(a) of the United States Code Annotated.

Section 3. Inspection. Application for license shall be made out in duplicate, one copy being referred to the Chief of Police, and the other copy to the City Electrical Inspector.

(a) The Chief of Police shall investigate the location where it is proposed to operate such machine, ascertain if the applicant is a person of good moral character, and either approve or disapprove the application.

(b) The Electrical Inspector shall inspect all wiring and connections to the machine, determine if the same complies with the Electrical Code of the City and shall either approve or disapprove the application.

(c) No license shall be issued to any applicant unless approved by Chief of Police and the Electrical Inspector.

APPENDIX D

No. 43,179

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED HAMEL, FRANK E. PRINGLE and JAMES B. VAN FLEET, JR., *Appellees*,

v.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas, EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas, JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas, JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas, and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas, *Appellants*.

SYLLABUS BY THE COURT

CONSTITUTIONAL LAW—*Coin-Operated Amusement Devices—License Fee—Possession of Federal Occupational Stamp.* In an action challenging the constitutional validity of a municipal ordinance imposing a license fee for the privilege of keeping or operating coin-operated amusement devices, it is *held* on appeal the ordinance is constitutional and within the legislative power of the city to enact as a means to suppress gambling, all as more fully set forth in the opinion.

Appeal from Wyandotte district court, division No. 1; O. Q. CLAFLIN, III, judge. Opinion filed April 6, 1963. Reversed.

George W. Haley, of Kansas city, argued the cause, and *C. W. Brenneisen, Jr.*, City Attorney, *Joseph A. Bukaty*,

James B. Flack and *Matthew G. Podrebarac*, all of Kansas City, were with him on the brief for the appellants.

William M. Cook, of Kansas City, argued the cause, and *Roy Cook*, also of Kansas City, was with him on the brief for the appellees.

The opinion of the court was delivered by

SCHROEDER, J.: This is an action challenging the constitutional validity of a municipal ordinance of Kansas City, Kansas, requiring a license for the operation of pinball machines. The trial court held the ordinance unconstitutional, and appeal has been duly perfected by the city.

The plaintiffs (appellees) operate small businesses varying in type within the confines of the city of Kansas City, Kansas. Most of them have coin-operated amusement devices known as pinball games located in or on the premises where they conduct their business. Their regular business is entirely separate and apart from these coin-operated amusement devices, although these devices do produce additional income.

By their amended petition the plaintiffs set forth material facts including the ordinance in question and state that most of the plaintiffs have purchased $250 Federal tax stamps in connection with their operation of these pinball games; that these stamps were purchased when plaintiffs were informed by Federal agents that all such coin-operated devices were subject to the $250 Federal tax; whether there was gambling on such devices or not. They allege the rule-making authority of the Federal Revenue Bureau adopted a regulation making coin-operated devices of the type operated by plaintiffs subject to this $250 tax, irrespective of whether the device was used for gambling of any kind. This rule was promulgated pursuant to U. S. C. A., Title 26, § 4462 (a) (2).

The ordinance in question was adopted on the 16th day of November, 1961, by the city commissioners of Kansas

City, Kansas. The portion material to this appeal reads as follows:

"ORDINANCE No. 43040

"An Ordinance regulating and imposing a license fee for the privilege of keeping or operating coin-operated amusement devices, providing for the revocation of such license, and providing penalties for violation thereof.

"Be it Ordained by the Governing Body of the City of Kansas City, Kansas:

"SECTION 1. Any person, firm or corporation displaying for public patronage or keeping for operation any coin-operated amusement device shall be required to obtain a license from the City of Kansas City, Kansas, upon payment of a license fee. Amusement devices shall include but not be limited to pinball machines.

"SECTION 2. Applications. Application for such license shall be made to the City License Department upon a form to be supplied by the License Department. The application for such license shall contain but not be limited to the following information:

"(*a*). Name and address of the applicant, age, date and place of birth, Name and address of owner of machine.

"(*b*). Place where machine or device is to be displayed or operated and the business conducted at that place.

"(*c*). Description of machine to be covered by the license; mechanical features, name of manufacturer, serial number.

"(*d*). Whether applicant or owner has paid a current $250.00 federal occupational tax for the use or permit to use on any place or premises in Kansas City, Kansas, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26), Paragraph (2) of Section 4461 (*a*) of the United States Code Annotated. *No license shall be issued to any applicant, and the license if issued shall be re-*

voked, whenever the applicant or owner has paid a $250.00 current federal occupational tax for the use or permit to use on the place or premises where the machine or device is to be displayed, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26), Paragraph (2) of Section 4461-(a) of the United States Code Annotated.

"SECTION 3. *Inspection.* Application for license shall be made out in duplicate, one copy being referred to the Chief of Police, and the other copy to the City Electrical Inspector.

"(*a*). The Chief of Police shall investigate the location where it is proposed to operate such machine, ascertain if the applicant is a person of good moral character, and either approve or disapprove the application.

"(*b*). The Electrical Inspector shall inspect all wiring and connections to the machine, determine if the same complies with the Electrical Code of the City and shall either approve or disapprove the application.

"(*c*). No license shall be issued to any applicant unless approved by the Chief of Police and the Electrical Inspector." (Emphasis added.)

The ordinance provided for an annual license fee of $10 on each machine for the privilege of operating or maintaining for operation each coin-operated mechanical amusement device, and provided for a penalty, in addition to the revocation of the license, of a fine of not more than $300. It provided that each day the ordinance was violated would constitute a separate offense. Other provisions relative to the enforcement of the ordinance are immaterial to this appeal.

By their amended petition the plaintiffs seek both temporarily and permanently to enjoin the enforcement of the ordinance because the defendants threaten to arrest, or cause to be arrested, those in violation of the foregoing ordinance who possess a $250 Federal tax stamp. The amended petition further enumerates the constitutional

grounds upon which they challenge the validity of the ordinance.

Upon joinder of issues and after hearing the case, the trial court held the ordinance to be unconstitutional and permanently enjoined the city from enforcing it for the reasons (1) that the provisions of section 3 (*c*) are fatal to the validity of the ordinance; and (2) "That Section 3 (*c*) cannot be deleted and the rest of Ordinance No. 43040 stand for the reason that the City is without power to enact an ordinance providing that a City license on a pinball machine shall not be issued to one who has purchased a $250 federal occupational tax stamp."

The appeal to this court presents the questions hereafter discussed.

The portion of the ordinance primarily under attack in this lawsuit is the second part of section 2 (*d*), heretofore quoted in italics.

The occupational tax on coin-operated devices is imposed by the provisions of U. S. C. A., Title 26, § 4461. It provides:

> "There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> "(1) $10 a year, in the case of a device defined in paragraph (1) of section 4462(a);
>
> "(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); and
>
> "(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device."

A "'coin-operated amusement or gaming device'" is defined in U. S. C. A., Title 26, § 4462 (*a*) as:

> "(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and
>
> "(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

From the foregoing the $250 special tax is imposed only on such coin-operated amusement or gaming devices as are defined in section 4462 (a) (2), *supra*. The city ordinance is not designed to prohibit the use of such machines as are defined in section 4462 (a) (1), *supra*, provided the owners comply with the city ordinance and procure a license.

While the purpose of the ordinance is not expressly stated, it is evident from a reasonable interpretation that it is designed to curb gambling on pinball machines in Kansas City, Kansas.

Both the state legislature and this court have made it clear that gambling is illegal in Kansas. (G. S. 1949, 21-915, 21-916, 21-918, 13-430, and G. S. 1961 Supp., 41-2708 [*a*].) In *Clemons* v. *Wilson*, 151 Kan. 250, 98 P. 2d 423, the court stated:

> ". . . it is the policy of this state to do everything possible to suppress gambling. . . ." (p. 256.)

It is an established principal of law that articles which lend themselves to illegal uses are subject to the police powers of the state and municipalities.

In *City of Wichita* v. *Stevens*, 167 Kan. 408, 207 P. 2d 386, it was held that a city under its police power had au-

thority to prohibit the possession of punchboards even though such punchboards were in warehouses and were not used for gambling. The court said:

> "... Under such an ordinance there was no occasion to determine as a question of fact whether punchboards were or were not gambling devices. In any event they were an instrument which the city determined was detrimental to the peace and welfare of the city, and within its police power the city may prohibit possession of them. . . ." (p. 413.)

The trial court stated the sole question presented by the ordinance was whether the city could refuse to license a pinball machine to an operator who has purchased a Federal tax stamp.

Prohibiting a license on the ground that the applicant holds a certain type of Federal tax stamp is not a new type of legislation. As early as 1937 the Kansas legislature passed a law providing that the county commissioners or the governing body of the city shall revoke any cereal malt beverage license "for purchasing or displaying a federal retail liquor tax stamp." This provision is part of our present cereal malt beverage law. (G. S. 1961 Supp., 41-2708.) An analogous situation is found in G. S. 1949, 41-1004. (See, *State* v. *Nesbitt*, 191 Kan. 142, ... P. 2d .....)

In *Deitch* v. *City of Chattanooga*, 195 Tenn. 245, 258 S. W. 2d 776, the Tennessee court held that a city ordinance prohibiting possession of a Federal wagering stamp is constitutional. The court quoted from another Tennessee decision as follows:

> " 'There is a direct and open connection between the possession of a federal license authorizing the retail sale of intoxicating liquors and the ultimate fact of such sale. The interests of men are such, and experience teaches, that they do not ordinarily incur the expense and trouble of procuring license to engage in the sale of intoxicants, unless they intend to do so.

> Apart from the statute making the possession of such license prima facie evidence of the fact of a sale, the inference might well be drawn, in the absence of all rebutting proof, that one who pays the fees and possesses himself of such license is engaged in the sale of intoxicants.' *Brinkley* v. *State*, 125 Tenn. 371 386, 143, S. W. 1120, 1123." (pp. 248, 249.)

In *Murphy* v. *California*, 225 U. S. 623, 56 L. Ed. 1229, 32 S. Ct. 697, the city of South Pasadena, California, in the exercise of its police power, passed an ordinance which prohibited all persons from maintaining a room where pool or billiard tables were kept, but permitted hotels, under the conditions specified in the ordinance, to provide such a room for the use of their guests. Murphy, who operated a pool room which was not connected with a hotel, was convicted for violating the ordinance. He contended before the United States Supreme Court that the ordinance violated the Fourteenth Amendment. In rejecting the contention the United States Supreme Court said:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." (pp. 628, 629.)

A case involving the seizure of numerous pinball devices, some of which provided neither pay-off nor free play, and others which issued no prizes but had a mechanism which could award free play, is *Sternall* v. *Strand*, 76 C. A. 2d 432, 172, P. 2d 921. There the court held there was nothing in the record to show the board of supervisors of San Diego

County was not cognizant of conditions which reasonably called for action of this nature, or that the board acted beyond what was reasonable in view of conditions, either known or believed by it to require action, even to the extent of prohibiting the mere possession of machines and devices which can and are so easily and frequently changed from an ostensibly innocent use to one which is not only evil in itself, but which, as a practical matter, encourages and leads to many other evils, against all of which the board was attempting to guard. The question of the reasonableness of an ordinance was said to be primarily one for the legislative authority.

In *Terry* v. *City of Portland et al.*, 204 Or. 478, 269 P.2d 544, the Oregon court held a statute imposing a privilege tax of $50 per annum on every coin-in-the-slot device, enacted in the exercise of the state's power to tax, does not prevent the city of Portland from adopting an ordinance prohibiting the ownership, operation and use of any coin-in-the-slot device, which was aimed not only at machines of gambling nature but also at machines that do not provide pay off or free play, notwithstanding that the ordinance, if enforced, would diminish the state's revenue.

In support of the trial court's decision that the ordinance is unconstitutional, the appellee argues the Federal Government has classified pinball machines as gambling devices requiring the payment of a $250 Federal stamp. This is evidenced by the regulations shown in the Code of Federal Regulations, Title 26, § 45,4462-1 (b), wherein it states:

> "(2) *Examples of machines or devices within scope of section* 4462 (*a*) (*2*). The following devices and machines illustrate the type of machines or devices within the scope of section 4462 (a) (2):
>
> "(i) A machine which is operated by means of the insertion of a coin, token, or similar object and which, even though it does not dispense cash or tokens, has

the features and characteristics of a gaming device whether or not evidence exists as to actual payoffs.

. . . . . .

"(iii) A pinball machine equipped with a push button for releasing free play and a meter for recording the plays so released, or equipped with provisions for multiple coin insertion for increasing the odds.

"(iv) Pinball machines in connection with which free plays are redeemed in cash, tokens, or merchandise, or prizes are offered to any person for the attainment of designated scores."

In 1942 the provisions of G. S. 1949, 21-1508, were before the court in *State* v. *Waite*, 156 Kan. 143, 131 P. 2d 708. The defendant was charged with violation of the statute and the question was whether the particular machine or device in question was a gambling device within the statutory definitions. The court held the particular "pin-ball" machine or device there described, which in no case paid off in money or tangible property, but gave the players who made certain scores additional free games, was not a gambling device because the privilege of such additional entertainment or amusement was not "property" within the meaning of the statute. The court said it was dealing with a criminal statute and strict construction must be applied.

The statute made it a criminal offense for a person to set up or keep in a public or private place *any gambling device, devised and designed* for the purpose of playing any game of chance for money or property.

Later the court in *State* v. *One Bally Coney Island No. 21011 Gaming Table*, 174 Kan. 757, 258 P. 2d 225, observed that the legislature had met in general session on six different occasions since the *Waite* case and made no change in the statute (21-1508, *supra*). If the court was incorrect in construing the purpose and intent of the act, it was said the legislature had abundant opportunity to give further

expression to its will, and that its failure to act amounted to a ratification of the interpretation placed upon the act by the court. Accordingly, the court held the particular "pin-ball" machine or device there described was not a gambling device and subject to seizure and destruction as such under G. S. 1949, 21-925.

The appellees rely on the two foregoing cases and say, of the legislature had the desire to classify pinball machines as gambling devices, it could easily have done so. The appellees ask, "how then does a pinball machine which does give free games, and which the Court in *State* v. *Waite* held is not *prima facie* a gambling device, become a matter in which the city can discriminate against a merchant for the operation thereof in his establishment? Does this action deny the appellees the equal protection of the law? Does it not deprive the appellees of property without due process of law? Does it not invade the province of the judiciary in determining the matter as wrongful, for our Court has ruled to the contrary, and in assessing penalties does it not invade the province of a jury in fact finding as to the guilt or innocence of a person having a coin operated device, and the right to be confronted by the accuser and the witnesses against them? Does it not violate Act 2, Section 1, of the Constitution of the State of Kansas to the effect that the legislative power of this state shall be vested in the House of Representatives and the Senate?"

The appellees contend there is no way they could comply with the laws in existence if the ordinance is allowed to stand, because if they comply with the ordinance they cannot comply with the Federal rules and regulations, and if they comply, on the other hand, with the Federal rules and regulations, they cannot comply with the proposed ordinance to procure a license.

The appellees emphasize that a gambling device has been defined as any instrument adapted and designed to

play any game of chance for money or property. (*City of Wichita* v. *Stevens*, supra.) We would emphasize that the foregoing definition includes the word *adapted*.

It would appear on the surface that the appellees have made a good case, but a closer look will disclose that pinball machines may be designed in various ways and, even though designed to pay off only in free games for those who play and register a sufficient score, can very easily be used, converted or adapted to gambling purposes.

Whether gambling takes place where pinball machines are kept depends primarily on the manner in which they are used, and not upon how they may be labeled or designed in their manufacture.

A distinction is to be noted on this point. In both the *Waite* and *Coney Island* cases the court was confronted with a particular "pinball" machine, and the question was whether it was a gambling device within the meaning of G. S. 1949, 21-1508. This statute, as worded, made it a criminal offense to keep a *gambling device designed and devised* for the purpose of playing any game of chance for money or property. No reference to the manner in which the machine was used appeared in the statute, and upon strict construction it was not read into the statute. In the *Coney Island* case, since the *machine itself* did not fall within the prohibition of 21-915, *supra*, it was held not to be subject to seizure and destruction as a gambling device under 21-925, *supra*.

It has undoubtedly been the experience of the Federal authorities that pinball machines are easily and frequently changed from an ostensibly innocent use to a *use* which is designed primarily for gambling, and they have concluded that a pinball machine is an instrument of organized gambling and rackets.

Some of the fifty states have legalized gambling within their borders and others do not have legalized gambling.

The Federal Government does not seek by the occupational tax on gambling devices to legalize gambling in all of the states, just as it has never sought to legalize the sale of liquor in all the states. The Federal Government has established no law with regard to the legality or illegality of gambling on pinball machines within the several states. Therefore, each state is free to determine whether it wishes to permit gambling or not.

While gambling violates the Kansas law, there is no Federal law against gambling, but if one operates a gambling device without purchasing a Federal stamp to permit gambling, the fine and imprisonment imposed by the Federal Government is severe. One is naturally led to the question, why do persons such as the appellees herein purchase the $250 Federal stamp for the operation of a coin-operated device which the Federal Government classifies as a gambling device? The answer seems obvious. The purchase of a $250 Federal stamp for the right to use a pinball machine on the premises in Kansas City, Kansas, raises a strong presumption of illegal activity.

Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, it is well settled that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and if it is not unreasonable or arbitrary.

Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public, and whether it is unreasonable or arbitrary are questions which are com-

mitted in the first instance to the judgment and discretion of the legislative body; and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

In determining whether an ordinance which has the effect of prohibiting pinball machines by conditions imposed upon the issuance of a license is reasonable, and whether it has a substantial relationship to the health, morals, safety or general welfare of the people of a municipality, the court may weigh the benefit to those people affected by the elimination of such devices against the benefits in having such devices available for use by those people, and the interests of the appellees as the owners of those devices.

It is true these machines may be operated by members of the public without any gambling, but there will obviously be very little benefit from such operation to anyone other than the owner by reason of payments received for their use. Certainly, a legislative body could reasonably conclude that the amusement provided to operators of such machines, which is all they would get from their operation unless they were used as gambling devices, would contribute little, if anything at all, to the health, safety, morals or welfare of such operators or of the people of Kansas City.

On the other hand, the potentialities for injury and harm to health, morals, safety and welfare of the public from these machines may quite reasonably have been regarded as very serious by the legislative body of Kansas City. (*Benjamin* v. *Columbus*, 167 O. S. 103, 146 N. E. 2d 854.)

We cannot say the enactment of the ordinance in question, which prohibits the issuance of a license to one who has paid a current $250 Federal occupational tax for the use of a coin-operated amusement or gaming device, or, if issued, that it be revoked when such Federal occupational tax has been paid, is unreasonable or arbitrary.

The appellees next attack the ordinance on the ground that it is unreasonable to require the approval of the Chief of Police and the Electrical Inspector before a coin-operated amusement device license can be issued to an applicant.

Assuming the applicant fulfills the other conditions, it is argued these officers under section 3(c) have arbitrary power to deny the issuance of a license, and this makes the ordinance bad as an unlawful delegation of legislative power, citing *Smith* v. *Hosford*, 106 Kan. 363, 187 Pac. 685; *Julian* v. *Oil Co.*, 112 Kan. 671, 212 Pac. 884; *Cities Service Co.* v. *Koenecke*, 137 Kan. 7, 20 P. 2d 460; and *Hudson Properties, Inc.* v. *City of Westwood*, 181 Kan. 320, 310 P. 2d 936.

A reasonable construction of the ordinance requires that we look at the whole of section 3 in the ordinance, and not merely to the last subparagraph thereof. The section is entitled "Inspection." Subparagraph (a) sets forth the purpose for which the Chief of Police shall investigate the applicant; and subparagraph (b) sets forth the purpose for which the Electrical Inspector shall inspect the premises where the electrical device is to be located.

Reasonably construed, the ordinance limits the functions of these officers to the duties specifically stated; and if the applicant and his premises meet the standards required by the ordinance, these officers are obligated to approve the application. This section merely provides for the delegation of administrative duties which are designed to assist the license department of the city in the administration of the ordinance.

In conclusion we hold the ordinance in question to be valid and constitutional. It is within the legislative power of the city to enact such ordinance. (*City of Wichita* v. *Stevens*, supra.)

The judgment of the lower court is reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR.,
Petitioners,

vs.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

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KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR.,

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The facts are largely set out in the opinion of the Kansas Supreme Court, 191 Kan. 293, which is printed as Appendix D to the petition for the Writ.

An ordinance regulating and licensing pinball machines was enacted on November 16, 1961, by the City of Kansas City, Kansas. Since pinball machines are attractive to minors and easily adaptable to organized gambling, the City Commissioners provided in the ordinance that a pinball machine could not be licensed in a place of business that also had a current federal gaming stamp. Most of the plaintiffs are tavern operators.

The trial court held the ordinance unconstitutional for the reason that §2(d) was a deprivation of the constitutional rights of the tavern operators under the fourteenth amendment and for the further reason that §3(c) constituted an illegal delegation of legislative power.

The Kansas Supreme Court, in its unanimous opinion of April 6, 1963, reversed the trial court and held the ordinance constitutional.

I.

QUESTIONS PRESENTED

A. May a City Prohibit the Operation of Pinball Machines Easily Adaptable to Gambling Without Showing They Are in Fact Used for Gambling?

B. May the City Set Up Possession of a Federal Stamp As a Conclusive Criterion for Denial of a License?

C. Does the Phrase, "Good Moral Character," Need Any Further Legislative Standards or Guidelines?

II.

REASONS FOR DENYING THE WRIT

A. A City May Prohibit the Operation of Pinball Machines Easily Adaptable to Gambling Without Showing They Are in Fact Used for Gambling.

Petitioners argue that the pinball ordinance has had the effect of denying licenses to individuals whose pinball machines and their operations are perfectly legal. (Petition, p. 8) While we have serious doubt as to the correctness of petitioners' assertion, it is clearly within the City's police power to prohibit *all* pinball machines, without determining the "legality" of their operation. If the City Commissioners reasonably believed that pinball machines are inherently harmful or offensive to the public, or that gambling is being conducted thereon, they could ban them altogether, regardless of type or description. *Murphy* v. *California*, 225 U.S. 623 (1912).[1]

Petitioners argue that it is unfair to not allow a pinball operator some reasonable opportunity to prove that he is not in violation of state anti-gambling laws. But if the City can completely prohibit all pinball machines, it

---

1. Under Kansas law, a city anti-gambling law may go beyond the State law if it does not conflict with a state statute. The Supreme Court of Kansas held in *City of Wichita* v. *Stevens*, 167 Kan. 408, 207 P.2d 386 (1949), that the City of Wichita had the authority to prohibit by ordinance the possession of punch boards even though such punch boards were in warehouses and not being used for gambling. The Court said at page 413:

"Under such an ordinance there was no occasion to determine as a question of fact whether punch boards were or were not gambling devices. In any event, they were an instrument which the city determined was detrimental to the peace and welfare of the City and within its police power the city may prohibit possession of them."

can certainly classify and legislate against those machines which are most likely to lead to the abuse against which it is legislating. In declaring a city ordinance valid which prohibited all persons from maintaining a room where pool or billiard tables were kept, but permitted hotels to provide such a room for their guests, this court in *Murphy* v. *California*, 225 U.S. 623 (1912), held:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." (pp. 628-29)

That not all participants in an activity deemed to be susceptible to abuse in fact engage in such abuse does not prevent the prohibition of the activity. It is the *possibility*, not the *presence*, of abuse which warrants the proscription. Compare *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), where this Court upheld a Kansas statute prohibiting debt adjusting despite petitioner's contention that he as an *honest* debt adjuster, was unconstitutionally deprived of his right to engage in his calling.

Before passing Ordinance 43040, the City Commissioners determined the strong likelihood that gambling was being conducted on pinball machines for which the $250 federal tax was paid, and they seek by the enforcement of the ordinance to curb this illegal activity. This regulation is well within the City's police power and the Com-

missioners are not obliged to give pinball operators classified in the ordinance a procedural opportunity to prove that they have not, in fact, violated any Kansas anti-gambling law.

B. The City May Set Up Possession of a Federal Stamp As a Conclusive Criterion for Denial of a License.

Because of the possibility and probability that pinball machines may be used for gambling, due process is not violated when the City denies a license for the operation of all machines on which a current federal gaming stamp is paid. The governing body can reasonably believe that devices which the federal government sees the necessity of taxing as gaming devices are more likely to be adaptable to gambling, and use the fact of possession of a federal tax stamp as conclusive proof that the machine is adapted or adaptable to gambling.

Certainly the governing body is equally concerned about the pinball operator who permits gambling on machines for which no current federal stamp has been paid. A license will be denied the non-federal tax stamp holder by the City for proven gambling operation.

But under the terms of the federal statute (68A Stat. 531, 26 U.S.C. §4461), certain pinball machines have been determined to be readily adaptable to gambling, and the legislative body of the City could reasonably believe that pinball operators would not purchase the federal stamp unless their devices were of the character that would require the stamps. Therefore, the Commissioners might well conclude that it is not necessary to examine a particular device to determine whether it is readily adaptable to gambling where the federal government has already required a gaming stamp.

C. The Phrase, "Good Moral Character," Needs No Further Legislative Standards or Guidelines.

The Court below held that the function of the Chief of Police under the ordinance to determine whether the applicant is of "good moral character" is purely ministerial. He is vested with no discretion, but only the duty to ascertain this one fact. By such construction of the ordinance, this Court is, of course, bound.

The only question is whether the crucial phrase is so vague and indefinite as to be unadministrable. We point out that it has long appeared in that exact form in the federal immigration laws, currently 66 Stat. 242, 8 U.S.C. 1427 (a) (3). In *United States* v. *Macintosh*, 283 U.S. 605, 616 (1931), this Court referred to "the *fact* of good character." (Emphasis the court's.) This is a fact which has been determined by federal courts in countless cases with no further legislative guides. Some difficulty has been experienced, to be sure, but the determination has been made.

Similarly the phrase appears in numerous licensing statutes. In Kansas alone the requirement appears for Embalmers (G.S. Kan. 1949, 65-1701); Nurses (G.S. Kan. 1949, 65-1115); Dentists (G.S. Kan. 1949, 65-1426); Optometrists (G.S. Kan. 1949, 65-1505), as amended by 1961 Supp.; Barbers (G.S. Kan. 1949, 65-1811), as amended by 1961 Supp.; Cosmetologists (G.S. Kan. 1949, 65-1902), as amended by 1961 Supp.

The boards administering each of these acts successfully determine as a day-to-day routine matter whether applicants have "good moral character." The lack of further standards has never been regarded as any obstacle to the performance of their duties.

Most common of all, perhaps, is the requirement as relating to attorneys at law. See G.S. Kan. 1949, 7-102. Even this Court requires of its practitioners that "their private and professional characters shall appear to be good." (Rule 5(1))

In all these instances a phrase is employed without elaboration because it is in common use and generally understood. That is all that is required to guide a ministerial officer in performing his delegated duties.

CONCLUSION

It is respectfully urged that the petitioners raise no substantial federal question in their petition which would entitle them to invoke the jurisdiction of the Court.

Respondent respectfully moves that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED. HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR., *Petitioners*

v.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas, *Respondents*

PETITIONERS' REPLY BRIEF

The principal virtue of respondents' brief in opposition is that it at least does not deny the petitioners' earlier statement of the issues arising in this case. It does, however, tend to obscure the significance of these issues by a discussion of respondents' answers on the merits.

The issue of paramount importance can be framed in several ways. It has to do, not with the ultimate objective of the Kansas City ordinance but, as we tried to make plain before, the methodology of the ordinance. The ordinance on its face purports to "regulate" pinball machines by imposition of a license tax. It is justified by the Kansas Supreme Court as an act calculated to suppress gambling activities associated with pinball machines. In actual operation, the ordinance (1) forbids a license for, *i.e.* outlaws, pinball machines whose owners have paid a $250 Federal stamp tax regardless of whether the pinball machines or their uses violate state anti-gambling law and (2) while it automatically forbids a license to owners of pinball machines who have paid the $250 tax, it does not deny a license to owners who, though legally obligated to pay the Federal tax, have failed to do so.

The ordinance thus condemns the legal and nonlegal pinball machines alike, without affording any opportunity for a property owner to prove that his machines do not run afoul of state anti-gambling law. The ordinance also discriminates in its impact as between those owners who obey and those who flout Federal law. These are novel issues of law and are submitted by petitioners to this Court as questions of substantial importance. Nothing said in the respondents' brief defeats these issues or renders them academic.

Respondents' chief reliance is upon the argument that, assuming the City *could* legally proscribe all pinball machines, regardless of their legality under applicable State law, it is immaterial that a victim of the actual ordinance has no opportunity to exculpate himself by proving that his machines are lawful. Like so

many legal arguments founded upon what a legislative body might have done rather than what it actually did, this one is altogether specious.. "If the City Commissioners," say respondents, "reasonably believed that pinball machines are inherently harmful or offensive . . . or that gambling is being conducted thereon, they could ban them altogether . . . ." (RB 3) But had the Commissioners promulgated such a hypothetical ordinance, they would have raised a question of substantive due process entirely different from the question of procedural due process raised in the case at bar. In the hypothesized situation it would be whether the avowed object of the legislation lay within the police power. In our case the due process issues center solely upon the relation between the means and the end of the ordinance actually passed.

Respondents forget that the Kansas Supreme Court has definitely construed the ordinance as being designed to suppress *gambling* on pinball machines. That being so, the anti-gambling purpose of the ordinance necessarily qualifies and limits the area of "reasonableness" wherein the ordinance may, consistently with due process, implement this purpose or object. Given its anti-gambling objective, we say there is no reasonable connection between means and end when the act automatically condemns both gambling and non-gambling pinball machines, deliberately foreclosing any opportunity for a distinction between the two. We also contend that the act unjustly and unreasonably discriminates between those who obey Federal law and those who do not.

Respondents, forget, too, that the ordinance must be appraised from a due process standpoint as it is written and designed, not as it might have been. Due

process, for example, does not compel a state to provide the machinery for appellate review of criminal prosecutions. But once it elects to do so, that machinery must be judged by the due process standards of reasonableness, just as any other purported exercise of the police power. *Griffin* v. *Illinois*, 351 U. S. 12. This principle is perfectly apposite here. Even assuming *arguendo* that a city might lawfully proscribe all pinball machines for any or no reason whatever, the City of Kansas City has chosen to enact a "regulatory" licensing statute aimed, according to the Kansas Supreme Court, at the inhibition of gambling activities. The ordinance must therefore be evaluated from a due process standpoint on these selfsame terms and in light of the avowed purposes of the legislation. Taking the ordinance as it is, petitioners contend that it fails to meet the test of due process. Its purpose being to suppress gambling, due process requires that its potential victims be allowed some procedural opportunity to disprove the act's imputation of illegal gambling activities to their own pinball machines. Likewise, there is no rational basis for the act's discrimination between pinball machines owners who pay the Federal tax and those who should but do not. There is just as much factual warrant for a suspicion of gambling on the latter's machines as upon those of the former. Hence, the favored treatment of those who defy Federal law is without reasonable foundation.

This last point, incidentally, is not denied by respondents but is the subject of considerable obfuscation. On page 5 of their brief they observe:

> "Certainly the governing body is equally concerned about the pinball operator who permits gambling on machines for which no current Fed-

eral stamp has been paid. *A license will be denied the non-Federal tax stamp holder by the City for proven gambling operation.*" (Emphasis supplied)

The first, and most important thing to note about the underscored language is that it dehors the record. It is an interpretation of the ordinance made by respondents rather than any judicial tribunal. They cite no authority for their interpretation. Petitioners are aware of no cases in which such a construction has been made. Certainly, no such adjudication was made in this case.

Furthermore, the language of the ordinance itself does not support respondents' conclusion. It is perhaps true that the Chief of Police, whose approval is a prerequisite for a license, might conclude from the existence of gambling activities conjoined with an applicant's failure to pay the $250 tax, that the applicant lacked the requisite "good moral character." But both the Kansas Supreme Court and respondents emphasize the purely "ministerial" character of the Chief's responsibilities in this regard. In any event, the respondents say the "non-Federal tax stamp holder's" gambling operation must be "*proven*" before he will be denied an operator's license. This puts the determination clearly beyond the competence of the Police Chief.

Unless they are relying upon Section 3, spelling out the Police Chief's duties of inspection, and the logically impossible theory just outlined, there is no conceivable basis in the language of the ordinance for the statement in respondents' brief. Indeed, the ordinance does not even require that an applicant disclose whether any gambling operations have been "proven" against him. Under these circumstances, how can respond-

ents justify their *ex cathedra* pronouncement quoted above? Not only are they masking their opinion as an established fact, but their opinion seems to be wrong on the merits. In any event, their statement that a license will be denied the "non-Federal tax stamp holder . . . for proven gambling operation," is sheer opinion and not an adjudicated fact. It naturally cannot be considered otherwise by this Court.

Even taking the opinion as correct, however, respondents' view of the ordinance does not traverse that of petitioners. Respondents simply say that, for some unspecified reason, the ordinance requires that a license be denied to an applicant who has not paid the Federal stamp tax for which he is liable, *if* he has been collaterally adjudged guilty of an actual "gambling" operation. Our point, of course, is that the ordinance discriminates between an applicant who has paid the tax and the applicant who, though liable for the tax, has refused to pay it. This is a discrimination between those who obey Federal law and those who do not. It has nothing to do with whether a person has violated State anti-gambling laws. The form of discrimination we speak of is unquestionably built into the ordinance and this is not denied by respondents in spite of the dubious construction of the ordinance unilaterally held by them and gratuitously put forward in their brief.

CONCLUSION

These considerations lead inexorably to the conclusion that the procedural operation of the Kansas City ordinance raises highly significant, and as yet unanswered, issues of Constitutional law. The issues have been properly argued and preserved and are ripe for

adjudication in the case at bar. We therefore respectfully pray that the writ of certiorari be granted.

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